Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

HIGINIO ROMERO AND FRANCES ROMERO, INDIVIDUALLY AND HIGINIO ROMERO AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD ROMERO,

Petitioners,

vs.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, STATE OF COLORADO; DAVID DUARTE, THE SHERIFF OF LAKE COUNTY IN HIS OFFICIAL CAPACITY; SEAN DEFABBO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DEPUTY SHERIFF OF LAKE COUNTY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals' decision to reverse the United States District Court's Order denying Respondent's Motion for Summary Judgment based upon qualified immunity was contrary to this Court's Rule set down in *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) where the District Court found there was sufficient evidence in the pre-trial record to create an issue of fact on whether Petitioner was deprived of a constitutional right.

Further, was the qualified immunity issue on appeal conceptually different from the Petitioner's Fourth Amendment excessive force claim so that the denial of the Summary Judgment Motion was not a final order, appealable under *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

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Petitioners Higinio and Frances Romero respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit issued in the above proceeding on July 21, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals of which review is sought (See App.1, p.1a) is reported at 60 F.3d 701 (10th Cir. 1995). That Order reversed the United States District Court's Order, not published. (See App.2, p.9a). The Court of Appeals' August 22, 1995 order denying the petition for rehearing and suggestion for rehearing en banc is not reported. (See App.3, p.19a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on July 21, 1995. (See App.1, p.1a). The petition for rehearing and suggestion of rehearing en banc was denied August 22, 1995. (See App.3, p.19a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was invoked under 28 U.S.C. § 1343.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutional right to be free from the use of excessive force, protected by the Fourth

Amendment of the United States Constitution. Further, redress for this violation was brought to the United States District Court for the District of Colorado pursuant to 42 U.S.C. § 1983.

STATEMENT OF THE CASE

A Writ of Certiorari is requested in this case to allow this Court to review the Tenth Circuit Court of Appeals Opinion which reversed the United States District Court for the District of Colorado's Order denying Respondent's Motion for Summary Judgment based upon qualified immunity. A summary of the background facts and proceedings follow.

Petitioners, Mr. and Mrs. Romero brought this suit because Officer Shawn DeFabbo, a Deputy Sheriff for Lake County, Colorado shot and killed their son, Richard Romero, in the early morning hours of August 4, 1992 at a deserted location in Eagle County, Colorado which is known as Tennessee Pass. The Romero's claim is for an unlawful Fourth Amendment seizure of their son's life. The known facts were obtained from Respondent since the confrontation occurring between Officer DeFabbo and Richard Romero was not witnessed by anyone. During an altercation, Richard Romero was shot dead by DeFabbo. Consequently, the Respondent was in a unique position to have all the evidence in his possession while Petitioner had none.

Once the Respondent filed a Motion for Summary Judgment claiming qualified immunity, the quest for

information via various discovery motions and depositions was stayed. In this case there was only one eye witness (Officer DeFabbo) and all information from the police investigation was in the hands of Respondent.

When Respondent's Motion for Summary Judgment based upon qualified immunity was denied by the District Court, Respondent then filed a Motion to Stay Discovery which was granted by the Tenth Circuit Court of Appeals. (See App.4, p.21a). Consequently, the Court of Appeals' decision to grant the stay and subsequently reverse the District Court Order denying Respondent's Motion for Summary Judgment was based solely upon information provided by the Respondent.

With the information that the Respondent did provide, it became clear that on August 4, 1992 Officer DeFabbo received a report from his dispatch of an automobile in need of assistance. When he responded, he traveled outside his jurisdiction into Eagle County. He approached the car and believed the individual to be intoxicated. Because DeFabbo was outside of his jurisdiction, he requested Eagle County Deputies be summoned to the scene. DeFabbo admitted that he did not know what to do with the intoxicated individual because he was outside of his jurisdiction, although it was not uncommon for Lake County Sheriff's Deputies to cover Eagle County. DeFabbo detained Romero at the scene, but neither arrested nor physically restrained him. He allowed Romero to roam the scene freely and was basically permitted to do anything he wanted for approximately forty to fifty minutes, with the exception of leaving the scene.

Further, from DeFabbo's statement, it was reported that during the time Romero was allowed to roam the scene, he opened his car trunk and removed a knife. All during this time, DeFabbo concluded and reported to his dispatcher that Romero was agitated, upset and intoxicated, yet he did not arrest him nor take any steps to restrain him. DeFabbo further reported that at some point after Romero went to his trunk, Romero got out of his car, confronted DeFabbo and ran a knife across DeFabbo's stomach. DeFabbo then reported Romero assumed an attack position with the knife at which time he stepped back and shot Romero three times. Six hours after the shooting Romero's blood alcohol level was .266.

Upon reviewing the Motion for Summary Judgment filed by the Respondent requesting governmental immunity, the United States District Court concluded there was a factual dispute and such Motion should be denied.

> "(The Court has) . . . reviewed the parties briefs, affidavits and the entire record. I find and conclude that genuine issues of material fact exist as to whether DeFabbo's actions were objectively reasonable under the circumstances. Duarte and DeFabbo have failed to sustain their burden of showing that they are entitled to judgment as a matter of law. Accordingly their Motion for Summary Judgment on the grounds that Romero was not deprived of a constitutional right will be denied." (See App.2, p.12a).

The Respondent appealed to the Tenth Circuit Court of Appeals. Thereafter, the U.S. District Court concluded the filing of the appeal was "frivolous," which would have allowed discovery to begin. (See App.5, p.23a). Before any documents were produced, depositions given

or any discovery had, Respondent then petitioned the Tenth Circuit Court of Appeals for a Stay of Discovery, which was granted.

When ruling on the merits of the appeal, the Court of Appeals again concluded the events occurring subsequent to the seizure (i.e. the moment in time when Romero was no longer free to leave because of DeFabbo's presence), and before the shots were fired were irrelevant to the inquiry concerning Romero's claim of unlawful seizure. (See App.1, p.6a). By only considering the facts surrounding the moment when the shooting occurred, the Court of Appeals ruled Romero did not show DeFabbo violated a clearly established constitutional right. (See App.1, p.5a). In so doing, it overruled the District Court's conclusion that there was sufficient evidence in the pretrial record to create a factual issue on whether or not DeFabbo's actions violated a clearly established constitutional right.

A Petition for Rehearing and suggestion en banc was requested but denied. (See App.3, p.19a). In such Petition, Romero set out the rule of law in *Johnson v. Jones, supra* where this Court stated that the scope of an interlocutory appeal is limited to "purely legal" challenges to the district court's ruling on whether a plaintiff's legal rights were clearly established and cannot include attacks on the courts "evidence sufficiency" determinations about whether there are genuine disputes of facts. *Johnson v. Jones,* 115 S.Ct. at 2156. Since the District Court found sufficient evidence to create a fact issue, the appeal should have been dismissed. (See App.2, p.12a).

Further, the Petition for Rehearing identified the "separatability" requirement for an interlocutory appeal to be final; that is to say, "a claim of immunity is conceptually distinct from the merits of Plaintiff's claim," *Mitchell v. Forsyth*, 472 U.S. at 527. Since the inquiry on qualified immunity and excessive force are one and the same (i.e. whether the officer's actions were objectively reasonable), the appeal should have been dismissed since the appeal was not "final."

Lastly, the Petition for Rehearing stated the Court of Appeals' decision to ignore the events subsequent to the time the seizure occurred and prior to the firing of the weapon was contrary to this Court's conclusion that the "totality of the circumstances" of the seizure must be analyzed to determine whether or not there was an excessive use of force. *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989) and *Tennessee v. Gardner*, 471 U.S. 1,8, 105 S.Ct. 1694, 1699-1700, 85 L.Ed.2d 1 (1985). The inquiry should begin when the seizure occurs, not when the bullet is fired. *Bella v. Chamberlain*, 24 F.3d 1251, 1255 (10th Cir. 1994).

The Court of Appeals reasoning appears to be grounded on its previous rulings that a violation of State law or Police procedure do not give rise to a Section 1983 claim, i.e. *Jones v. City and County of Denver*, 854 F.2d 1206 (10th Cir. 1988) (State Law) and *Wilson v. Meeks*, 52 F.3d 1547 (10th Cir. 1995) (police regulations). (See App.1, p.6a and 7a). However, the events which the Court of Appeals would not consider in both *Jones, supra* and *Wilson, supra* in analyzing an unlawful seizure under the Fourth Amendment occurred *prior* to the seizures taking place.

Consequently, reliance on these cases seems to be misplaced.

The Colorado Supreme Court in *Leake v. Cain*, 720 P.2d 152, 163 (Colo. 1986) stated:

> "A person who operates an automobile under the influence of alcohol violates 42-4-101 (C.R.S. 1984). When a police officer stops a person he knows or reasonably should know driving under the influence he arguably has no discretion but to arrest the suspect."

Additionally, Lake County Police Regulations Sheriff Manual provides that:

> "it is a policy of Lake County Sheriff's Department that anyone placed under arrest by a member of the Department will be handcuffed. To insure the safety of the officer and/or the citizens all subjects should be handcuffed behind their backs."

Further, the District Court concluded:

> "By 1992, it was well-settled Fourth Amendment doctrine that individuals have a right to be free from unreasonable seizures of their person. *See, e.g., Graham*, 490 U.S. at 395; *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1968); *see also Culver v. Town of Torrington, Wyo.*, 930 F.2d 1456, 1459 (10th Cir. 1991)
>
> ("Unquestionably, individuals have the right to be free from the use of excessive force by governmental officers when being detained."). Plaintiffs have presented evidence demonstrating that DeFabbo's actions were not objectively reasonable in light of that clearly established doctrine, and DeFabbo has failed to establish

> that he neither knew nor should have known of the relevant legal standard. Accordingly, DeFabbo's motion for summary judgment on the ground that he is entitled to qualified immunity will be denied." (App.2, p.13a).

The Court of Appeals substituted its opinion for the District Court on the significance of the facts after the seizure, as well as the law and standards in place on August 4, 1992, by simply categorizing them as irrelevant. This reasoning appears to be contrary to the law in *Graham, supra* and not permitted by the Rule in *Johnson v. Jones, supra.*

The District Court considered the totality of the circumstances which included DeFabbo's actions (or inactions) after the seizure occurred, the law in place at the time and the appropriate police standard to be followed. The District Court ruled that there was sufficient evidence to proceed to trial. The Tenth Circuit Court of Appeals refused to do so and consequently this Writ to this Court follows.

ARGUMENT SUMMARY

REASON FOR GRANTING THE WRIT

The failure of the Court of Appeals to dismiss the interlocutory appeal in this case appears to be in direct conflict with prior decisions of this Court. The District Court found there was sufficient evidence presented in the pre-trial record to create a material issue of fact sufficient to proceed with trial to determine if DeFabbo's

actions violated the constitutionally protected rights of Romero. *Johnson v. Jones, supra.*

It further appears the Court of Appeals' decision to refuse to dismiss the interlocutory appeal is in direct conflict with this Court's prior decision because there is no conceptual difference between a governmental immunity and a Fourth Amendment, excessive force claim. *Johnson v. Jones, supra* and *Mitchell v. Forsyth, supra.*

Lastly, the refusal of the Court of Appeals to consider *all* the events after the seizure appear to be in conflict with this Court's prior decisions. *Tennessee v. Gardner, supra* and *Graham v. Connor, supra.*

ARGUMENT

The Court of Appeals should have dismissed the appeal when asked to review the United States District Court's decision that there was sufficient evidence to create a material issue of fact to decide if the Petitioner, Romero, was deprived of a constitutional right.

In *Johnson v. Jones,* 132 L.Ed.2d at 246, this Court ruled:

> "We now consider the appealability of portion of the District Court's Summary Judgment Order that, though entered in a "qualified immunity" case, determines only a question of "evidence sufficiency", i.e., which facts a party may or may not be able to prove at trial. This kind of Order, we conclude is not appealable."

Other Circuits have addressed the issue and uniformally followed the U. S. Supreme Court's decision:

In *Tamez v. City of San Marcos, Texas*, 62 F.3d 123, 125 (5th Cir. 1995), the Court stated:

> "A Defendant, entitled to invoke a qualified immunity defense, must not appeal a District Court's Summary Judgment Order insofar as that Order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial". Citing *Johnson v. Jones.*

As the Fifth Circuit Court went on to say in *Tamez*, at p.125:

> "An appellate Court has jurisdiction to review an interlocutory denial of qualified immunity only to the extent that it 'turns on an issue of law' ". *Mitchell v. Forsyth*, 472 U.S. at 530, 105 S.Ct. at 2817

In *Ratliff v. DeKalb County, Georgia*, 62 F.3d 338, 341 (11th Cir. 1995), the Court of Appeals stated:

> "The District Court determined that the evidence in the record would allow a finding of discrimination on the part of the Defendants and said that, as a legal matter, it was clearly established that the discrimination would violate Federal law".

The 11th Circuit refused to assume appellate jurisdiction because the Respondent alleged:

> "The District Court, in considering Defendant's motion, assumed erroneous facts or assumed facts which were unsupported by the evidence in the record".

In *Sanders v. Brundage*, 60 F.3d 484, 486 (8th Cir. 1995), the Court concluded:

> "When the issue on appeal is whether the pre-trial evidence is sufficient to create a genuine issue of material fact then the denial of Summary Judgment is not immediately appealable."

Here, the Court of Appeals for the Tenth Circuit reversed the United States District Court's Order which found that there was sufficient evidence in the pre-trial record to create a genuine issue of material fact on whether Romero was deprived of his constitutional right to be free from the use of excessive force by DeFabbo during the detention. This is contrary to the rule set down in *Johnson v. Jones, supra* as well as in conflict with rulings of other circuits that have been presented with this issue.

Further, the Tenth Circuit's categorization of facts after a seizure as being irrelevant to the inquiry of whether there is a Fourth Amendment violation, is in conflict with *Graham v. Connor, supra* and *Tennessee v. Gardner, supra.*

Lastly, the inquiry in a Fourth Amendment excessive force claim concerns the officer's actions. "Are the officers actions during the seizure 'objectively reasonable' in the light of the facts and circumstances confronting him, without regard to underlying intent or motive?" *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Likewise, when qualified immunity has been asserted, the officer's actions are viewed from the same objectively reasonable standard, " . . . whether a reasonable police officer could believe the manner of Plaintiff's arrest and detention in

this case to be constitutionally permissible, in light of the clearly established law and information Defendant possessed at the time." *Anderson v. Creighton*, 43 U.S. 635, 640-641, 107 S.Ct. 3034, 3039-40, 97 L.Ed.2d 523 (1987). There is nothing "conceptually different" between these two inquiries, and therefore the appeal should be dismissed. *Johnson v. Jones*, 132 L.Ed.2d at 247 and *Mitchell v. Forsyth*, 472 U.S. at 527.

In conclusion, the Petitioner would request this Court to grant this Writ of Certiorari.

Respectfully submitted,

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APPENDIX 1

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

HIGINIO ROMERO, individually and as Personal Representative of the Estate of Richard Romero; FRANCES ROMERO, individually,	)	No. 94-1440
Plaintiffs-Appellees,	)	(Filed Jul. 21, 1995)
v.	)	
BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, STATE OF COLORADO,	)	
Defendant,	)	
and	)	
DAVID DUARTE, Sheriff of Lake County in his official capacity; SEAN DEFABBO, individually and in his official capacity as Deputy Sheriff of Lake County,	)	
Defendants-Appellants.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 93-C-1525)

Submitted on the briefs:

Joseph M. Ricci of Alexander & Ricci, Colorado Springs, Colorado, for Plaintiffs-Appellees.

Theodore S. Halaby and Robert M. Liechty of Halaby Cross Liechty Schluter & Buck, Denver, Colorado, for Defendant-Appellant DeFabbo.

Before ANDERSON, BALDOCK, and BRORBY, Circuit Judges.

ANDERSON, Circuit Judge.

The parents of Richard Romero, who is now deceased, brought this 42 U.S.C. § 1983 suit against the sheriff and deputy sheriff of Lake County, Colorado, and the Lake County Board of Commissioners.[1] The suit alleges that deputy sheriff Sean DeFabbo violated the Fourth Amendment by using deadly force against Richard Romero. DeFabbo moved for summary judgment on the ground of qualified immunity. The district court denied summary judgment and DeFabbo now appeals.[2]

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[1] After examining the briefs and appellate record, this panel has determined unanimously to grant the parties, request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f) and 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

[2] We consider DeFabbo to be the sole appellant, as he represents that Sheriff Duarte was incorrectly named as an appellant in the notice of appeal.

We exercise jurisdiction under 28 U.S.C. § 1291, *see Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), and reverse and remand.

The record reveals the following. On August 4, 1992, a Lake County dispatcher asked DeFabbo to check on a vehicle in need of assistance in Eagle County, Colorado.[3] At approximately 1:00 a.m., DeFabbo discovered the vehicle on the side of the road with a flat tire. After talking to the driver, Richard Romero, DeFabbo suspected that Romero was intoxicated. DeFabbo returned to his patrol car and asked the Lake County dispatcher to inform Eagle County that the driver was intoxicated and to indicate that he would wait until Eagle County responded.

Romero asked for permission to fix his car. DeFabbo told Romero that he could fix his car, but could not drive because he appeared to be intoxicated. Romero denied that he was intoxicated and refused to submit to any tests. Both men returned to their cars. At some point, Romero approached DeFabbo's car. DeFabbo got out of his car and asked Romero to return to his car. Romero initially turned toward his car, but suddenly turned around and punched DeFabbo in the nose. Romero then ran a knife across DeFabbo's stomach. DeFabbo retreated a few steps and drew his gun. He repeatedly told Romero to drop the knife or he would shoot. Romero refused to drop the knife. Instead, he raised the knife and walked toward DeFabbo in an attack position. DeFabbo fired one shot, after which Romero took another step toward

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[3] According to DeFabbo, Lake County occasionally investigates accidents in Eagle County, when Eagle County cannot respond immediately.

DeFabbo. Thinking he had missed with the first shot, DeFabbo fired twice more. Romero died from the gunshot wounds.

Plaintiffs' theory of liability is that DeFabbo contributed to the circumstances that led to the use of deadly force. Deadly force, plaintiffs claim, would have been unnecessary had DeFabbo arrested and handcuffed Romero, an intoxicated driver, as required by standard police procedure and state law.[4] DeFabbo moved for summary judgment on the basis of qualified immunity. Citing *Tennessee v. Garner*, 471 U.S. 1 (1985), DeFabbo claims that his use of deadly force in self-defense was not unreasonable. He also states that his failure to handcuff Romero did not violate the constitution.

The district court denied DeFabbo's motion for summary judgment, ruling that genuine issues of material fact existed regarding the reasonableness of the use of deadly force and that DeFabbo failed to show he was unaware, or should not have known, of law clearly establishing the right to be free from unreasonable seizures. The district court did not comment on plaintiffs' theory of liability.

"We review the district court's denial of qualified immunity on summary judgment de novo." *Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir. 1995). When a defendant asserts the affirmative defense of qualified immunity,

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[4] In support of their argument that DeFabbo should have arrested and handcuffed Romero, plaintiffs cite to the Lake County Sheriff's manual and *Leake v. Cain*, 720 P.2d 152 (Colo. 1986).

"the plaintiff initially bears a heavy two-part burden." *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995). The plaintiff must show (1) "that the defendant's actions violated a constitutional or statutory right" and (2) that the right "allegedly violated [was] clearly established at the time of the conduct at issue." *Id.* " '[P]laintiff must articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity.' " *Id.* (quoting *Romero*, 45 F.3d at 1475).

"If the plaintiff fails to carry either part of his two-part burden, the defendant is entitled to qualified immunity." *Id.* at 1535. If the plaintiff has made the required two-part showing, " 'then the defendant bears the burden, as a movant for summary judgment, of showing no material issues of fact remain that would defeat the claim of qualified immunity.' " *Romero*, 45 F.3d at 1475 (quoting *Walter v. Morton*, 33 F.3d 1240, 1242 (10th Cir. 1994)). We hold that plaintiffs failed to show that DeFabbo violated a clearly established constitutional right and that DeFabbo, therefore, is entitled to qualified immunity.

We view the evidence in the light most favorable to the nonmoving party. *Id.* Because plaintiffs did not present any evidence to the contrary, we assume from DeFabbo's evidence that Romero punched DeFabbo and ran a knife across his stomach, that DeFabbo retreated and drew his gun, that despite warnings to drop the knife, Romero approached DeFabbo with the knife, and that DeFabbo then shot Romero in self-defense.

Plaintiffs' excessive force claim must be analyzed under the reasonableness standard of the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386, 394 (1989). An

officer's use of deadly force in self-defense is not constitutionally unreasonable. *See Garner*, 471 U.S. at 11 (deadly force may be used if "officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or to others). Based on the undisputed evidence, we hold that DeFabbo reasonably feared for his life when he shot Romero. Romero punched DeFabbo in the nose, ran the knife across DeFabbo's stomach, and, with knife in hand, pursued DeFabbo as he retreated. Romero continued toward DeFabbo even after being fired upon once. DeFabbo's use of deadly force under these circumstances was not constitutionally unreasonable. *See O'Neal v. DeKalb County*, 850 F.2d 653, 655, 657-58 (11th Cir. 1988) (holding officers did not act unreasonably in shooting suspect who charged toward one of them with a knife).

Without citing any evidence in the record, plaintiffs claim there are disputed issues regarding the use of deadly force which preclude summary judgment. Essentially, plaintiffs argue as a matter of law that the shooting should not be viewed as an act of self-defense because DeFabbo put himself in a dangerous situation by not handcuffing Romero. Plaintiffs urge us to look beyond the immediate circumstances of the shooting and evaluate the reasonableness of DeFabbo's actions from the point DeFabbo told Romero he was not free to leave the scene.

We rejected a similar argument in *Wilson v. Meeks*, 52 F.3d 1547 (10th Cir. 1995). There, we refused to consider whether an officer who used deadly force in self-defense had caused the suspect to behave in a threatening manner. *Id.* at 1554. We followed other circuits that have confined the reasonableness inquiry in excessive force

cases "to whether the officer was in danger at the moment of the threat." *Id.* (citing cases).

Here, the record indicates that DeFabbo waited with Romero for at least one half hour for Eagle County to respond. DeFabbo had no reason to fear for his life until Romero threatened him with the knife. Evidence that DeFabbo failed to arrest and handcuff Romero prior to the threat is not relevant to the reasonableness of DeFabbo's decision to shoot Romero.[5] *See id.; see also Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir.) (refusing to examine events prior to threat against the officer to determine whether officer could have avoided situation which led to use of deadly force), *cert. denied*, 115 S. Ct. 81 (1994); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (holding officer's failure to follow standard arrest procedures is not relevant to whether officer acted reasonably in using deadly force). DeFabbo's failure to arrest and handcuff Romero does not become relevant simply because such actions may be required by state law and police procedure. Further, we note that violations of state law and police procedure generally do not give rise to a § 1983 claim. *See Jones v. City & County of Denver*, 854 F.2d

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[5] Whether an officer acted reasonably in using deadly force is "heavily fact dependent." *Wilson*, 52 F.3d at 1553. We recognize that an officer's conduct prior to the suspect's threat of force may be relevant to the reasonableness inquiry if the conduct is "immediately connected" to the suspect's threat of force, *see Bella v. Chamberlain*, 24 F.3d 1251, 1256 n.7 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995), and the officer is alleged to have acted with the state of mind required for liability under § 1983.

1206, 1209 (10th Cir. 1988) (state law); *Wilson*, 52 F.3d at 1554 (police regulation).

Finally, we reject plaintiffs' argument pursuant to *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 199-200 (1989), that DeFabbo assumed a constitutional duty to protect Romero when he refused to allow Romero to leave the scene. Even assuming the premise that DeFabbo had a constitutional duty to protect Romero, an intoxicated driver, from the consequences of his own actions, plaintiffs cannot show that DeFabbo violated clearly established law by ignoring that duty. *See McLenagan v. Karnes*, 27 F.3d 1002, 1008 n.9 (4th Cir.), *cert. denied*, 115 S. Ct. 581 (1994).

The judgment of the United States District Court for the District of Colorado is REVERSED and REMANDED for further proceedings consistent with this opinion.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 93-C-1525

HIGINIO ROMERO, et al.,

Plaintiffs,

v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, STATE OF COLORADO, et al.,

Defendants.

ORDER

(Filed Aug. 23, 1994)

CARRIGAN, J.

Plaintiffs Higinio and Frances Romero commenced this action against the defendants the Board of County Commissioners of Lake County, Colorado; David Duarte, in his capacity as the Sheriff of Lake County; and Sean DeFabbo, individually and in his capacity as the Deputy Sheriff of Lake County, asserting constitutional violations pursuant to 42 U.S.C. § 1983. Defendants Duarte and DeFabbo have moved for summary judgment and for a stay of discovery. The plaintiffs have responded by opposing the defendants' motions.

The issues have been fully briefed and oral argument would not materially facilitate the decision process. Jurisdiction is founded upon 28 U.S.C. § 1343(3).

I. BACKGROUND.

The facts appear to be as follows: On August 4, 1992, at approximately 1:00 a.m., Deputy Sheriff DeFabbo received a report of an automobile in need of assistance. He responded to the report, although the car was located just outside Lake County in Eagle County.

The car belonged to Richard Romero. Upon meeting him, DeFabbo believed he was intoxicated. Because DeFabbo was outside his jurisdiction, he requested that Eagle County deputies be summoned to the scene. DeFabbo detained Romero, but neither arrested nor physically restrained him.

Before the Eagle County officials arrived, Romero approached DeFabbo and punched him in the face. Romero then displayed a large knife, which he ran across DeFabbo's stomach. DeFabbo stepped back, drew his gun, and repeatedly told Romero that he would be shot if he did not drop the knife. Romero nevertheless raised the knife and approached DeFabbo. DeFabbo shot Romero three times, wounding him fatally.

Plaintiffs are Romero's parents, who have commenced this action on behalf of themselves and as representatives of their son's estate. Plaintiffs allege that DeFabbo's conduct deprived Romero of his Fourth Amendment right to be free from unreasonable seizures of his person. They further allege that Duarte, as the Sheriff of Lake County, is liable for failing to train Lake County deputies how to detain intoxicated drivers outside Lake County.

II. ANALYSIS.

Summary judgment is proper if the pleadings, depositions and affidavits, if any, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party opposing a properly supported summary judgment motion may not rest upon mere allegations of the complaint, but must set forth evidence of specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A factual dispute is material only if, under governing law, its resolution might affect the action's outcome. A factual dispute is genuine only if a reasonable fact finder could return a verdict for the non-moving party. *Id.*

A. Was Romero Deprived of a Constitutional Right?

Duarte and DeFabbo have moved for summary judgment on the ground that Romero was not deprived of a constitutional right.

The United States Supreme Court has recognized that the Fourth Amendment prohibits unreasonable seizures of the person. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Determining whether the force used effect a particular seizure is reasonable requires a balancing of the individual's Fourth Amendment interests against the countervailing governmental interests at stake. *Id.* Proper application of the reasonableness test requires careful attention to the facts and circumstances of each case, including whether the suspect poses an immediate threat

to the safety of the officer or others and whether he is actively resisting, or attempting to evade, arrest. *Id.*

The calculus of reasonableness must allow for the fact that officers often must make split-second judgments about the amount of force that is necessary in a particular situation under tense and uncertain circumstances. *Id.* at 396-97. Ultimately, the question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting him, without regard to underlying intent or motivation. *Id.* at 397.

I have reviewed the parties' briefs, the affidavits, and the entire record. I find and conclude that genuine issues of material fact exist as to whether DeFabbo's actions were objectively reasonable under the circumstances. Duarte and DeFabbo have failed to sustain their burden of showing that they are entitled to judgment as a matter of law. Accordingly, their motion for summary judgment on the ground that Romero was not deprived of a constitutional right will be denied.

B. Is DeFabbo Entitled to Qualified Immunity?

DeFabbo has moved for summary judgment on the ground that he is entitled to qualified immunity.

A government official who performs discretionary functions generally is entitled to qualified immunity if his conduct "does not violate clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 547 U.S. 800, 819 (1982). When qualified immunity has been asserted, summary judgment is appropriate unless the plaintiff demonstrates

that the defendant's actions were not "objectively reasonable when assessed in light of legal rules that were clearly established when the action was taken." *Chapman v. Nichols*, 989 F.2d 393, 397 (10th Cir. 1993). If the plaintiff makes this showing, the defendant still can prevail if he establishes "extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard." *Snell v. Tunnell*, 920 F.2d 673, 696 (10th Cir. 1990) (quoting *Harlow*, 457 U.S. at 819).

By 1992, it was well-settled Fourth Amendment doctrine that individuals have a right to be free from unreasonable seizures of their person. *See, e.g., Graham*, 490 U.S. at 395; *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1968); *see also Culver v. Town of Torrington, Wyo.*, 930 F.2d 1456, 1459 (10th Cir. 1991) ("Unquestionably, individuals have the right to be free from the use of excessive force by governmental officers when being detained."). Plaintiffs have presented evidence demonstrating that DeFabbo's actions were not objectively reasonable in light of that clearly established doctrine, and DeFabbo has failed to establish that he neither knew nor should have known of the relevant legal standard. Accordingly, DeFabbo's motion for summary judgment on the ground that he is entitled to qualified immunity will be denied.

C. Have the Plaintiffs Presented Evidence of an Improper Training Policy?

Duarte has moved for summary judgment on the ground that there is no evidence indicating that there was a failure to train.[1]

Inadequacy of police training may serve as the basis for § 1983 liability where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. *Canton v. Harris*, 489 U.S. 378, 388 (1989). Where the need to train officers to perform a particular task is "plainly obvious," failure to do so may constitute deliberate indifference to constitutional rights. *Id.* at 390 n.10.[2]

Defendants have acknowledged that "[i]t is not out of the ordinary for Lake County deputies to go into Eagle County . . . to respond to accidents in order to assist Eagle County deputies." Defendants have not disputed

---

[1] Duarte alternatively argues that, because DeFabbo did not violate Romero's constitutional rights, there can be no action for failure to train. However, I already have concluded that genuine issues of material fact exist as to whether DeFabbo's actions violated Romero's Fourth Amendment rights.

[2] The *Canton* Court explained:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

489 U.S. at 390 n.10 (citation omitted).

that Lake County deputies are not trained how to detain intoxicated drivers outside of Lake County. In light of these facts, and the fact that Colo. Rev. Stat. § 42-4-1202 criminalizes driving under the influence of alcohol, I find and conclude that a genuine issue of fact exists whether the need to train Lake County deputies to detain intoxicated drivers outside of Lake County was "plainly obvious." Accordingly, Duarte's motion for summary judgment on the ground that there is no evidence indicating that there was a failure to train will be denied.

D. Are the Plaintiffs Entitled to Recover Alleged Damages Relating to Loss of Affection and Economic Support?

Finally, Duarte and DeFabbo contend that the plaintiffs are not entitled to recover alleged damages relating to their loss of affection and economic support as a matter of law.

Defendants rely on *Trujillo v. Board of County Commissioners*, where the Tenth Circuit held that a mother and sister of a decedent had no § 1983 claim for relief arising from the decedent's death unless the allegedly unconstitutional act was directed at and intended to deprive them of their personal constitutional rights. 768 F.2d 1186, 1190 (10th Cir. 1985). *Trujillo* is distinguishable from this case, however, because the *Trujillo* plaintiffs alleged injury to their own personal constitutional rights and did not sue on behalf of the decedent. *See id.* at 1187 & n.3.[3]

---

[3] *Dohaish v. Tooley*, upon which the *Trujillo* defendants attempted to rely, also is distinguishable from this case. *See* 670

In *Berry v. City of Muskogee*, the Tenth Circuit considered the proper measure of damages in a § 1983 action commenced by a decedent's wife on behalf of herself and her children, and as the personal representative of her husband's estate. 900 F.2d 1489 (10th Cir. 1990). The decedent had been murdered by fellow inmates at the Muskogee City-Federal Jail. *Id.* at 1492. Plaintiff asserted that the city had deprived her husband of his rights under the Eighth and Fourteenth Amendments and sought damages for her husband's pain and suffering and loss of earnings, her own grief and loss of consortium, and her children's grief and loss of companionship. *Id.*

On appeal from a jury verdict in the plaintiff's favor, the City argued that the only proper measure of damages was the injury suffered by the decedent. *Id.* at 1500. After lengthy analysis, the Tenth Circuit concluded that the "federal remedy to be applied to § 1983 death cases . . . should be a survival action." *Id.* at 1506. Thus, the court determined that the proper measure of damages would include medical and burial expenses, pain and suffering before death, loss of earnings based upon the probable duration of the victim's life had the injury not occurred, and the victim's loss of consortium. *Id.* at 1507.[4]

F.2d 934 (10th Cir.), *cert. denied*, 459 U.S. 826 (1982). "Dohaish's action was not a § 1983 action to compensate a survivor for the death of a relative." *Berry v. City of Muskogee*, 900 F.2d 1489, 1504 n.20 (10th Cir. 1990).

[4] Because the trial court had instructed the jury that the plaintiff could be awarded wrongful death-type damages, the Tenth Circuit remanded the case for a new trial. *Berry*, 900 F.2d at 1507.

In light of *Berry*, I find and conclude that the plaintiffs are not entitled to recover damages relating to their alleged loss of affection and economic support. Thus, the defendants' motion for summary judgment on that ground will be granted.

Accordingly IT IS ORDERED that:

(1) Defendants Duarte and DeFabbo's motion for summary judgment is granted in part and denied in part;

(2) Defendants' motion for a summary judgment that Romero was not deprived of a constitutional right is denied;

(3) DeFabbo's motion for a summary judgment that he is entitled to qualified immunity is denied;

(4) Duarte's motion for a summary judgment that there is no evidence indicating that there was a failure to train is denied;

(5) Defendants' motion for a summary judgment that the plaintiffs are not entitled to recover alleged damages relating to their own loss of affection and economic support is granted;

(6) Defendants' motion for a stay of discovery pending resolution of the summary judgment motion is denied as moot; and

(7) The parties and their counsel are ordered to meet and confer within eleven days of this order in a good faith attempt to settle the case without further litigation, expense or delay. The parties shall report to this court in writing within fifteen days of this order,

stating the results of their settlement negotiations and whether a conference before a Magistrate Judge or some other alternative dispute resolution proceeding would facilitate settlement.

Dated at Denver, Colorado August 23, 1994.

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HIGINIO ROMERO, individually and as Personal Representative of the Estate of Richard Romero; FRANCES ROMERO, individually,	)	No. 94-1440
Plaintiffs - Appellees,	)	
v.	)	
BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, STATE OF COLORADO,	)	
Defendant,	)	
and	)	
DAVID DUARTE, The Sheriff of Lake County in his official capacity; SEAN DEFABBO, individually and in his official capacity as Deputy Sheriff of Lake County,	)	
Defendants - Appellants.	)	

ORDER
(Entered August 22, 1995)

Before ANDERSON, BALDOCK, and BRORBY, Circuit Judges.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By /s/ Audrey F. Weigel
Deputy Clerk

Mr. Joseph M. Ricci
Alexander & Ricci
3608 Galley Road
Colorado Springs, CO 80909

APPENDIX 4

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HIGINIO ROMERO, individually and as Personal Representative of the Estate of Richard Romero; FRANCES ROMERO, individually,	)	No. 94-1440
Plaintiffs - Appellees,	)	
v.	)	
BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, STATE OF COLORADO,	)	
Defendant,	)	
and	)	
DAVID DUARTE, The Sheriff of Lake County in his official capacity; SEAN DEFABBO, individually and in his official capacity as Deputy Sheriff of Lake County,	)	
Defendants - Appellants.	)	

ORDER

(Filed Dec. 9, 1994)

Before MOORE and BRORBY, Circuit Judges.

Defendant Sean Defabbo has filed a motion to stay all district court proceedings pending his appeal of

the district court's order rejecting his qualified immunity defense. Upon consideration of the motion, plaintiffs' response, the district court's orders, and the relevant law, we conclude that a stay is warranted because the district court's orders do not support its conclusion that the appeal is frivolous. The orders failed to set forth any evidence to support the district court's determination that Defendant Defabbo's actions were not objectively reasonable; in contrast, the district court's statement of the facts supports Defendant Defabbo's claim of self-defense and reasonable force. Accordingly, the motion for stay is granted. All district court proceedings in the above captioned case are stayed pending resolution of the appeal of the district court's denial of the qualified immunity defense.

Entered for the Court

PATRICK FISHER, Clerk

By /s/ Audrey F. Weigel
Deputy Clerk

Mr. Joseph M. Ricci
Alexander & Ricci
3608 Galley Road
Colorado Springs, CO 80909

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 93-C-1525

HIGINIO ROMERO, et al.,

Plaintiffs,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, STATE OF COLORADO, et al.,

Defendants.

ORDER

(Filed Nov. 14, 1994)

CARRIGAN, J.

Plaintiffs Higinio and Frances Romero commenced this action against the defendants the Board of County Commissioners of Lake County, Colorado; David Duarte, in his capacity as the Sheriff of Lake County, and Sean DeFabbo, individually and in his capacity as the Deputy Sheriff of Lake County, asserting constitutional violations pursuant to 42 U.S.C. § 1983. On August 23, 1994, this court denied the defendants' motion for summary judgment based upon qualified immunity. Defendants seek to appeal that ruling.

"[A]n interlocutory appeal from an order [denying summary judgment] on . . . qualified immunity grounds relates to the entire action and, therefore, it divests the district court of jurisdiction to proceed with any part of the action against an appealing defendant." *Stewart v.*

Donges, 915 F.2d 572, 576 (10th Cir. 1990). Thus, the plaintiffs have moved for an order certifying that the appeal is frivolous so that the case may proceed to trial in this court.

In an excessive force case, "the qualified immunity defense . . . is of limited value [because] the substantive inquiry that decides whether the force exerted by police was so excessive that it violated the Fourth Amendment is the same inquiry that decides whether the qualified immunity defense is available." *Ouezada v. County of Bernalillo*, 944 F.2d 710, 718 (10th Cir. 1991). That inquiry "has always been viewed as a factual inquiry best answered by the fact finder." *Id.* at 715. This court has fully considered the evidence presented concerning whether the defendants' actions were objectively unreasonable in violation of the plaintiffs' constitutional rights. *See id.* at 717. The Court of Appeals applies a standard requiring that it accept those findings unless it is left with the "definite and firm conviction that a mistake has been committed." Fed. R. Civ. P. 52(a); *Quezada*, 944 F.2d at 715.

Because I find that, by taking this appeal, the defendants can accomplish nothing but delay, IT IS ORDERED that:

(1) Plaintiffs' motion for certification of frivolousness of appeal is granted; and

(2) The parties and their counsel are ordered to meet and confer within eleven days of this order in a good faith attempt to settle the case without further litigation, expense or delay. The parties shall report to this court in writing within fifteen days of this order,

stating the results of their settlement negotiations and whether a conference before a Magistrate Judge or some other alternative dispute resolution proceeding would facilitate settlement.

Dated at Denver, Colorado November 14, 1994.

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE JIM R. CARRIGAN

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the Order signed by Judge Carrigan to:

Joseph Ricci, Esq.
3608 Galley Rd.
Colorado Springs, CO 80909

James Buck, Esq.
1873 S. Bellaire St. #1400
Denver, CO 80222

John W. Dunn, Esq.
108 S. Frontage Rd. #300 Vail, CO 81657

/s/ Illegible
Deputy Clerk

Dated: November 14, 1994
Re: 93-C-1525

Supreme Court, U.S.
FILED
DEC 5 1995
CLERK

No. 95-760

In The

Supreme Court of the United States

October Term, 1995

HIGINIO ROMERO and FRANCES ROMERO, individually and HIGINIO ROMERO as Personal Representative of the Estate of RICHARD ROMERO,

Petitioners,

v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, STATE OF COLORADO; DAVID DUARTE, THE SHERIFF OF LAKE COUNTY IN HIS OFFICIAL CAPACITY; SEAN DEFABBO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DEPUTY SHERIFF OF LAKE COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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Date: December 5, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

16 pp

QUESTIONS PRESENTED

1. Whether *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), precluded the court below from accepting jurisdiction over a denial of an immunity-based motion, where the historical facts were undisputed but where the district court found a dispute as to whether such facts would amount to a constitutional violation.

2. Whether the court below correctly determined that given such undisputed facts, there was no constitutional violation.

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BRIEF IN OPPOSITION

Respondent, Sean Defabbo,[1] respectfully requests that this Honorable Court deny the petition for writ of *certiorari* seeking review of the Tenth Circuit opinion in this case. That opinion is reported at 60 F.3d 702 (10th Cir. 1995).

COUNTERSTATEMENT OF THE FACTS

This case concerns whether the respondent officer violated petitioners' decedent's Fourth Amendment right when the officer shot and killed the decedent because the decedent attacked the officer with a knife.

Respondent relies, as did the Tenth Circuit, upon the facts set forth by the district court in its order. These facts are set forth below in their totality and are reprinted on page 10(a) of the petition:

> The facts appear to be as follows: On August 4, 1992, at approximately 1:00 a.m., Deputy Sheriff Defabbo received a report of an automobile in need of assistance. He responded to the report, although the car was located just outside Lake County in Eagle County. [The

[1] Petitioners incorrectly identified all defendants in the district court as appellants to the circuit court (and respondents herein). Only Deputy Sheriff Defabbo in his individual capacity appeared before the circuit court; although Sheriff Duarte had initially joined the interlocutory appeal, he was incorrectly named. *See Romero v. Board of County Commissioners*, 60 F.3d 702, 703 n.2 (10th Cir. 1995).

> respondent officer's jurisdiction was Lake County, not the adjacent Eagle County.]
>
> The car belonged to Richard Romero [petitioners' decedent]. Upon meeting him, [respondent] Defabbo believed he was intoxicated. Because Defabbo was outside his jurisdiction, he requested that Eagle County deputies be summoned to the scene. Defabbo detained Romero, but neither arrested nor physically restrained him.
>
> Before the Eagle County officials arrived, Romero approached Defabbo and punched him in the face. Romero then displayed a large knife, which he ran across Defabbo's stomach. Defabbo stepped back, drew his gun, and repeatedly told Romero that he would be shot if he did not drop the knife. Romero nevertheless raised the knife and approached Defabbo. Defabbo shot Romero three times, wounding him fatally.

The Tenth Circuit related substantially the same facts although it outlined a few more details of the incident. *See Romero v. Board of County Commissioners*, 60 F.3d 702, 703 (10th Cir. 1995). For purposes of its ruling, the Tenth Circuit made its factual assumptions explicit:

> We view the evidence in the light most favorable to the non-moving party. . . . Because plaintiff did not present any evidence to the contrary, we assume from Defabbo's evidence that Romero punched Defabbo and ran a knife across his stomach, that Defabbo retreated and drew his gun, that despite warnings to drop the knife, Romero approached Defabbo with the knife,

> and that Defabbo then shot Romero in self-defense.

Romero, 60 F.3d at 704.

Although petitioners now suggest some type of error in not submitting other facts to the district court prior to its ruling (*see* petition, pp. 2-3), the mechanism for presenting facts to oppose an immunity-based motion was available under Rule 56(f). This mechanism was previously outlined by the Tenth Circuit in the context of opposing immunity-based motions. *See Jones v. City and County of Denver*, 854 F.2d 1206, 1210-11 (10th Cir. 1988). However, in spite of this procedure, petitioners submitted no affidavit under Rule 56(f) demonstrating a need to discover and present further facts to the district court.

The trial court's ruling was explicit in finding only a dispute as to the legal significance of the undisputed facts, notwithstanding its mischaracterization that "genuine issues of material fact exist as to ***whether Defabbo's actions were objectively reasonable*** under the circumstances" (emphasis added). *See* district court's order reprinted in the petition, p. 12(a). The district court at no time stated that there was a dispute as to the historical facts; rather, the district court only stated in effect that there was a dispute as to whether those historical facts would support a legal conclusion of objective reasonableness under the circumstances. Even before this Court, petitioners assert no dispute as to an historical fact.

Finally, petitioners brought this Court's opinion of *Johnson v. Jones* to the attention of the Tenth Circuit both before and after the Tenth Circuit's opinion herein. Prior

to issuing the opinion on July 21, 1995, petitioners submitted supplemental authority pursuant to F.R.A.P. 28(j) (*see* respondents' appendix, p. 1(a)) and also presented the question in a petition for rehearing (*see* pertinent excerpt in respondents' appendix, p. 2(a)), which the Tenth Circuit denied. *See* petitioners' appendix, pp. 19(a)-20(a). Thus, the Tenth Circuit has already considered application of *Johnson v. Jones.*

REASONS WHY THE PETITION SHOULD BE DENIED

1. Jurisdiction in the Tenth Circuit was correct under *Johnson v. Jones.*

Johnson v. Jones concerns a traditional dispute of historical facts: whether the defendants were present and " 'stood by and allowed others to beat the plaintiff,' " 115 S. Ct. 2154, or whether they were not. If they were present, then they allegedly violated the plaintiff's constitutional rights; on the other hand, if they were not, then no such allegation could arise. Thus, resolution of this issue rose or fell upon the establishment of this historical fact.

The instant case concerns no such dispute of historical fact. Rather, the dispute, in the district court's words, concerned solely "whether Defabbo's actions were objectively reasonable under the circumstances." This is purely a legal question. *See Lennon v. Miller,* 66 F.3d at 416, 422 (2nd Cir. 1995) ("the question of whether it was objectively reasonable for the officers to believe that they did not violate the plaintiff's rights [in the context of an

alleged improper arrest] is purely a legal determination."). The fact that the district court misspoke and referenced this dispute as an "issue of material fact" is inconsequential, especially where the district court in the same sentence clearly defined this dispute as a legal dispute. *See also Christophel v. Kukulinsky*, 61 F.3d 479, 485 (6th Cir. 1995) ("a defendant's right to appeal the denial of qualified immunity does not turn on the phrasing of the district court's order, however").

Indeed, this Court stated in *Johnson v. Jones* that it would expect the courts of appeals to make such distinctions regarding reviewable and unreviewable orders:

> [it was argued that] if appellate courts try to separate an appealed order's reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is 'genuine'), they will have great difficulty doing so. * * * [T]he court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason.

Johnson, 115 S.Ct. at 2159. *See also Lennon v. Miller*, 66 F.3d 416, 422 (2nd Cir. 1995) ("inasmuch as the parties do not dispute the material facts and the court did not cite any such factual disputes, the question of the reasonableness of the officers' actions is the only question that could have prevented the court from ruling 'as a matter of law' on the qualified immunity defense. However, in the absence of a material factual dispute, the question of whether it was objectively reasonable for the officers to believe that they did not violate the plaintiff's rights is a

purely legal determination for the court to make"); *Stella v. Kelley*, 63 F.3d 71, 74 (1st Cir. 1995) ("the bottom line, then, is simply this: a summary judgment order which determines that the pretrial record sets forth a genuine issue of fact, as distinguished from an order that determines whether certain given facts demonstrate, under clearly established law, a violation of some federally protected right, is not reviewable on demand"); *Sanderfer v. Nichols*, 62 F.3d 151, 153 n.2 (6th Cir. 1995) (even though the district court cited evidence to support a constitutional violation, the circuit court found appellate jurisdiction because the plaintiff's version of the events, regardless of the sufficiency of the evidence, did not state a claim for a constitutional violation); and *Reece v. Groose*, 60 F.3d 487, 489-90 (8th Cir. 1995) (by its nature, an immunity-based motion is fact-intensive). Thus, it was proper for the court below to analyze the district court's order to determine that there were no disputes of historical facts, but only a dispute as to the legal significance of the undisputed facts.

Finally, because petitioners brought *Johnson v. Jones* to the attention of the Tenth Circuit on two occasions, there is no need for this Court to vacate the Tenth Circuit's opinion and remand for further consideration under *Johnson v. Jones*. Indeed, on the same date the Tenth Circuit issued its opinion in *Romero v. Board of County Commissioners* (July 21, 1995), it handed down its opinion in *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995), in which it *sua sponte* dismissed an appeal under the consideration of *Johnson v. Jones*.

Because *Johnson v. Jones* does not apply to the case herein, the Tenth Circuit properly had jurisdiction and

there is no reason for this Court to further review the matter.

2. There is no reason for this Court to consider the significance of the pre-seizure activity.

This issue is improperly presented on page 6 of the petition in the statement of the case, not in the argument. This alludes to the Tenth Circuit's disposal of petitioners' argument that the officer's failure to arrest and handcuff the decedent prior to the decedent's attack set forth a constitutional violation. *See Romero,* 60 F.3d at 705. This issue was properly resolved by the Tenth Circuit and there is no need for this Court to consider the issue.

CONCLUSION

For these reasons, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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July 5, 1995

Patrick Fisher, Clerk
United States Court of Appeals
Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257

RE: Romero v. BOCC of the County of Lake, et al, Case No. 94 C 1440

Dear Clerk:

Please reference Tyson Johnson Et Al, Petitioners v. Houston Jones, found at 63 LW 4552, decided by the United States Supreme Court on June 12, 1995 to the Response Brief for the proposition that a Defendant, entitled to invoke a qualified immunity defense, may not appeal a District Court's Summary Judgment Order in so far as that Order determines whether or not the pre-trial record sets forth a "genuine" issue of fact for trial. Enclosed is a copy of that ruling.

Also enclosed are seven (7) copies of this letter.

Very Truly yours,

ALEXANDER & RICCI

/s/ Joseph M. Ricci
Joseph M. Ricci
JMR:mas
Enclosures

cc: Robert Liechty
John Dunn

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 94-1440

HIGINIO ROMERO and FRANCES ROMERO, INDIVIDUALLY AND HIGINIO ROMERO AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD ROEMRO,

Plaintiffs-Appellees,

vs.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, STATE OF COLORADO; DAVID DUARTE, THE SHERIFF OF LAKE COUNTY IN HIS OFFICIAL CAPACITY; SEAN DEFABBO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DEPUTY SHERIFF OF LAKE COUNTY,

Defendants-Appellants.

PETITION FOR REHEARING (INCORPORATING SUGGESTION FOR REHEARING IN BANC)

ALEXANDER & RICCI

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ATTORNEYS FOR PLAINTIFFS – APPELLEES

SUGGESTION FOR REHEARING IN BANC
(Pursuant to 10th Cir.R. 35.2)

(a) I express a belief based on a reasoned and studied professional judgment that the panel decision is contrary to the following decision(s) of the Supreme Court or of the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

1. *Johnson v. Jones,* ___ U.S. ___, 63 U.S.L.W. 4553 (decided 6/12/95) (district court's denial of summary judgment, amounting to a determination that evidence in the pretrial record shows a genuine issue of fact for trial, rather than that a given set of facts violates pre-existing clearly established law, is not an immediately appealable "collateral order" pursuant to *Mitchell v. Forsyth,* 472 U.S. 511 (1985).

2. *Tennessee v. Gardner,* 421 U.S. 1 (1985), *Brower v. County of Inyo,* 489 U.S. 593, 595, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989), *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989), and *Bella v. Chamberlain,* 24 F.3d 1251 (10th Cir.1994). An analysis of a 4th Amendment claim begins once the seizure occurs and consequently events thereafter are relevant to that determination. The totality of the circumstances must be considered when deciding an excessive force case.

COMES NOW Plaintiffs-Appellees ("Petitioners"), Higinio Romero and Frances Romero, by and through their attorney of record, Joseph M. Ricci of ALEXANDER & RICCI, and for their Petition for Rehearing and incorporating herein their suggestion for Rehearing In Banc in the above appeal would state as follows:

This panel of the 10th Circuit has ruled that Defendant-Appellant, DeFabbo, did not violate a clearly established constitutional right and that DeFabbo, therefore, is entitled to qualified immunity. In doing so, this Court overruled the District Court which decided genuine issues of material fact existed regarding the reasonableness of DeFabbos' use of deadly force and that DeFabbo failed to show he was unaware, or should not have known, of law clearly establishing the right to be free from unreasonable seizure. The Petitioners' position is that the law regarding the right to be free from unreasonable seizure by a police officer was clearly established on August 4, 1992 and the District Court is in a unique position to determine if genuine issues of fact existed concerning DeFabbo's conduct and violation of that right. Such determination is not properly reviewable under *Johnson v. Jones*, ___ U.S. ___, U.S.L.W. 4553 (decided 6/12/95).

The Petitioners recognize the basis for governmental immunity in the cases cited and relied upon in this Court's Order. Indeed, Petitioners would concur that it is appropriate to provide immunity to a police officer who must make split-second decisions after a seizure has been made to determine whether or not his life is in

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